



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

March 14, 1997

The Honorable Steven C. Hilbig
Bexar County Criminal District Attorney
Bexar County Justice Center
300 Dolorosa, Suite 5072
San Antonio, Texas 78205-3030

Letter Opinion No. 97-026

Re: Whether a constable may require a deputy constable, who is on duty, to serve a document entitled "notice to vacate premises" and to charge a fee for serving the notice (ID# 39163)

Dear Mr. Hilbig:

You ask whether a constable may require a deputy¹ constable, who is on duty, to serve a document entitled "notice to vacate premises" and to charge a fee for serving the notice. You conclude that an on-duty deputy constable is authorized to serve a "notice to vacate premises" and to charge a fee only if the commissioners court first sets a fee for such a service pursuant to section 118.131 of the Local Government Code. We conclude, by contrast, that an on-duty constable or deputy constable is without authority to serve a "notice to vacate premises" and that the commissioners court may not authorize an on-duty constable or deputy constable to do so by purporting to establish a fee for the service.

The authority and duties of constables and deputy constables are set forth in section 86.021 of the Local Government Code:

(a) A constable shall execute and return as provided by law each process, warrant, and precept that is directed to the constable and is delivered by a lawful officer.

(b) A constable may execute any civil or criminal process throughout the county in which the constable's precinct is located and in other locations as provided by the Code of Criminal Procedure or by any other law.

(c) A constable expressly authorized by statute to perform an act or service, including the service of civil or criminal process, citation, notice, warrant, subpoena, or writ, may perform the act or service anywhere in the county in which the constable's precinct is located.

(d) Regardless of the Texas Rules of Civil Procedure, all civil process may be served by a constable in the constable's county or in a county contiguous

¹You ask about both "regular" and "reserve" deputy constables. We do not believe that the distinction between the two types of deputy constables is relevant to the legal issues raised by your query.

to the constable's county, except that a constable who is a party to or interested in the outcome of a suit may not serve any process related to the suit.

(e) The constable shall attend each justice court held in the precinct.

Section 86.021 requires a constable to execute and return "each process, warrant, and precept that is directed to the constable and is delivered by a lawful officer." You inform us that the document at issue in your request, a "notice to vacate premises," is a notice required by section 24.005 of the Property Code. In most circumstances, in order to bring an action² for forcible entry and detainer or forcible detainer, a landlord must first satisfy certain requirements, including giving a tenant who defaults in the payment of rent "at least three days' written notice to vacate the leased premises." Prop. Code § 24.005(a). "The notice shall be given in person or by mail at the leased premises." *Id.* § 24.005(f).

This office examined the authority of sheriffs and constables and their deputies to serve these notices to tenants in their private capacities as agents and employees of landlords, purportedly under the authority of the statutory predecessor to section 24.005 of the Property Code, in Attorney General Opinion H-694. That opinion concluded that a notice under this statutory provision is not process or a precept³ issued by a legal authority, "that sheriffs and constables have no duty, authority or power to 'execute' such notice," and that a sheriff or constable who purports to execute such a notice commits an unlawful act. Attorney General Opinion H-694 (1975) at 2. In addition, the opinion addressed the contents of these notices and concluded that the use of the words "The County of _____," "The State of Texas," the state seal, or any representation that a notice is the official act of the sheriff or constable is unlawful. *Id.* at 3.

Service of a notice to vacate premises by an on-duty constable or deputy constable would constitute a representation that the notice is the official act of the constable. On the basis of Attorney General Opinion H-694, we conclude that an on-duty constable or deputy constable is not authorized to serve a Property Code, section 24.005 "notice to vacate premises."

You are correct that, as a general matter, a constable or deputy constable is not authorized to charge a fee for performing a service unless the commissioners court has set a fee for the service⁴ and that section 118.131 of the Local Government Code gives the commissioners court broad authority to establish fees for services performed by constables and deputy constables that are not

²See Tex. R. Civ. P. 738-755 (rules relating to forcible entry and detainer actions in justice courts).

³For a discussion of the meaning of the term "precept," see Attorney General Opinion MW-117 (1979).

⁴See Attorney General Opinion JM-1046 (1989) at 4 (sheriff or constable not entitled to any fee for unsuccessful attempt to serve process until commissioners court sets fee under section 118.131 of Local Government Code).

otherwise provided for in the Local Government Code.⁵ We do not believe, however, that section 118.131 permits a commissioners court to authorize a constable or deputy constable to perform an act that would otherwise be contrary to law.

S U M M A R Y

An on-duty constable or deputy constable is without authority to serve a Property Code, section 24.005 "notice to vacate premises." A commissioners court may not authorize an on-duty constable or deputy constable to serve such a notice by purporting to establish a fee for the service under Local Government Code, section 118.131.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

⁵See Attorney General Letter Opinion No. 94-084 (1994) (Local Government Code section 118.131 authorizes commissioners court to set fee for services performed by sheriff and constable's office even though no fee for the service was authorized prior to September 1, 1981) (citing Attorney General Opinion JM-193 (1984)); *see also* Attorney General Opinion JM-1046 (commissioners court authorized to set fee for unsuccessful attempt to serve process under section 118.131 of Local Government Code).